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US DISPUTES FOCUS

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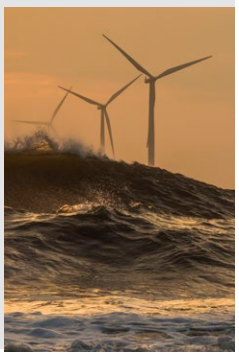
THE YEAR IN REVIEW



US DISPUTES FOCUS

THE YEAR IN DISPUTES:

MAY

Rob Harkavy

Spain's failed immunity challenge leaves questions unanswered

A decision in the English High Court has placed it at loggerheads with the Court of Justice of the European Union.

The 24 May High Court decision of **Mr Justice Fraser** in *Infrastructure Services Luxembourg v Kingdom of Spain* has already caused much debate as investor-state dispute settlement (ISDS) practitioners around the world come to terms with its far-reaching implications.

The case hinged on Spain's challenge to the recognition of an **International Centre for Settlement of Investment Disputes** (ICSID) arbitration award (the *Antin* award), with the Court dismissing Spain's arguments which were based on sovereign immunity and European Union case law.

The claimants, represented by **Nick Cherryman** and **Richard Clarke** of **Kobre & Kim**, and **Patrick Green KC** of **Henderson Chambers**, saw the Court uphold **Mrs Justice Cockerill**'s June 2021 decision, resulting in Spain being ordered to pay approximately EUR 120 million for breaching the Energy Charter Treaty (ECT).

Clarity

This ruling bought clarity to a longstanding global legal debate regarding the validity of intra-EU arbitration awards, in light of the Court of Justice of the European Union's (CJEU) decisions in the *Achmea* and *Komstroy* cases. The London High Court affirmed that these cases do not impact the enforcement of the Antin ICSID Award.

In 2008, the Dutch insurance company Achmea initiated arbitration proceedings against Slovakia under the Netherlands-Slovakia Bilateral Investment Treaty (BIT). The dispute arose from Slovakia's decision to reverse healthcare privatisation measures, which affected Achmea's subsidiary, **Union Healthcare**. Slovakia argued that the arbitration clause in the BIT was invalid and incompatible with EU law. The case eventually reached the CJEU in 2018 with the Court concluding that the arbitration clause in the BIT was indeed incompatible with EU law, creating significant implications for the validity of intra-EU investment treaties and future of investment arbitration within the EU.

In 2021 in *Komstroy*, the CJEU doubled down on its Achmea decision. In that case, the Ukrainian energy company Komstroy was in dispute with the Republic of Moldova over the ownership and control of a hydro-electric power plant which the government of Moldova had sought to nationalise. The company had argued that Moldova's actions constituted a violation of its obligations under the ECT, as well as under the 1996 Ukraine-Moldova BIT. In 2013, an arbitral award of USD 46.5 million was made in the company's favour, but this was set aside in 2016 by the Paris Court of Appeal, which agreed with Moldova that the arbitral tribunal lacked jurisdiction over the dispute. The

In May, the English High Court signalled a continuing post-Brexit divergence from its European counterparts when it upheld the '*Antin* award' despite the CJEU's earlier decisions in *Achmea* and *Komstroy*

Paris court ruled that the "claims to money" referred to in the ECT are claims pursuant to a contract associated with an investment and that an 'investment' involves a contribution of capital or resources. It concluded that the claim arose out of a contract for the supply of electricity that did not involve any 'contribution' and therefore could not be classified as an investment. Following an appeal by Komstroy, the French *cour de cassation* quashed the Paris Court of Appeal's decision in 2018, reinstating the award on the basis that the Paris Court of Appeal had wrongly introduced a requirement not contained in the ECT, namely the condition of a contribution of capital or resources.

The case eventually landed at the door of the CJEU which, in a complex and detailed judgment, ruled that arbitral awards already rendered in intra-EU arbitrations seated in a member state on the basis of the ECT should not be enforced by the courts of member states.

Far-reaching implications

The English court's rebuttal of the CJEU has implications far beyond the dispute itself. **Justin Williams**, a partner in the London office of **Akin Gump Strauss Hauer & Feld** opines that "people are going to be looking to enforce intra-EU claims outside the EU as they would likely fail within the Union because of *Achmea*". This could spell good news for London as it seeks to consolidate its place at the top table of international dispute resolution in the face of vigorous international competition, one of the many topics debated at 2023's London International Disputes Week.

Mr Justice Fraser's ruling established for the first time in an English court that Article 54 of the ICSID convention, combined with Section 2(2) of the State Immunity Act (1978), constitutes a submission by a signatory state to the jurisdiction for the registration of ICSID Awards in England. Williams sums up succinctly: "If a state enters into an arbitration agreement it waives immunity from the process."

Chloe Edworthy, a litigation partner at **Macfarlanes** in London, is full of praise for "a confident judgment that seeks to close the door to applicants looking to complicate and delay enforcement in England and Wales". She tells *CDR*: "The answer from the English court is simple – where the ICSID Committee has considered and dismissed objections under the standard procedure and the award is found to be valid and authentic, applicants are going to struggle to resist enforcement in England and Wales."

Edworthy continues: "The judge got very close to calling Spain's argument a 'have your cake and eat it' position whereby a state can say that while it is a party to an international treaty (here the ECT) its obligations should be interpreted differently to those for other

treaty nations. That position got short shrift with the judge who explained that, while he had committed 163 paragraphs to his judgment, future applicants should hear the message loud and clear that challenges of this nature would not afford lengthy hearings or long judgments as it is only in exceptional circumstances that these kind of applications will carry any weight."

Irrespective of the decision in this case, it is clear that – in light of the global drive to clean, sustainable energy sources reflected in the policies of national governments, and the growing view that the ECT is no longer fit for purpose – state-investor energy disputes are likely to occupy the courts for some time to come. While many signatories, including Spain, have already signalled their intention to withdraw, Williams is clear that "the bottom line is that with the combination of energy transition, national policy and the treaty's sunset provision, the ECT will remain an important tool".

Viren Mascarenhas, a litigation and arbitration partner at **Milbank**'s New York office, who in his previous role with **King & Spalding** helped secure a landmark ICSID award for the British oil and gas exploration company **Rockhopper** in a claim against Italy over the withdrawal of drilling rights, agrees that the drive to clean energy is likely "to trigger investment-treaty arbitrations or commercial arbitrations". Mascarenhas sees further potential for disputes as the world adopts new technology as it seeks to reduce the global carbon footprint of energy production. He explains: "The phasing out of old energy will give rise to disputes. And the technology that goes into wind farms or solar panels is being impacted by supply-chain issues, so we will see more arbitration disputes over these capital-intensive, renewable energy sources."

Somewhat counter-intuitively, and as renewable energy projects become more widespread, there is a distinct likelihood that the most progressive organisations will find themselves with a significant financial handicap compared with later market entrants. Mascarenhas posits that "rapidly changing technology is going to make a lot of stuff cheaper – and exponentially so – and so, if you were a first-generation mover, while you had that first mover advantage, you are now going to be disadvantaged".

A rock and a hard place

It seems inevitable that governments, like Spain, will be trapped between a rock and a hard place for many years to come. International treaties such as the Paris Agreement and United Nations Framework Convention on Climate Change have emboldened activist groups and NGOs to act over a perceived failure to do enough to combat rising global temperatures, while companies who have invested millions – and sometimes billions – of dollars into oil and gas exploration will seek to recover their losses as national and supranational legislation renders their investments almost worthless. But international fossil-fuel companies, so often portrayed as the villains of the piece, may have grounds for optimism. In the same way that **British American Tobacco** and **Imperial Tobacco** have led the way in the development of less harmful nicotine-replacement products, the likes of **Chevron**, **Total** and **Conoco Phillips** are pivoting their investments towards clean energy. Governments will surely conclude that constructive dialogue and cooperation will enable a smoother, safer and more effective transition to sustainable energy which can only be of benefit to the planet. CDR